

1
2
3
4 KEVIN LIPSCOMB,
5 Petitioner,
6 v.
7
8 TIM VIRGA,
9 Respondent.
10
11

12 Case No. 13-cv-05744-JD
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS AND
DENYING CERTIFICATE OF
APPEALABILITY**

Re: Dkt. No. 24

Kevin Lipscomb, a pro se state prisoner, has brought a habeas petition pursuant to 28 U.S.C. § 2254. The Court ordered respondent to show cause why the writ should not be granted. Respondent filed an answer and a memorandum of points and authorities in support of it. Petitioner filed a traverse. The petition is denied.

BACKGROUND

Petitioner was found guilty of evading a police officer with willful and wanton disregard for the safety of persons and property, possession of a firearm by a felon, discharging a firearm from a motor vehicle, and assault with a semiautomatic firearm. Clerk's Transcript ("CT") at 339-42. The trial court also found true the enhancement allegations for prior felony convictions, prior serious felony convictions, and prior prison terms. *Id.* at 198-99, 486. Lipscomb was sentenced to 67 years to life in prison. *Id.* at 517.

The California Court of Appeal ordered the restitution fine reduced to \$10,000, but affirmed the judgment in all other respects. *People v. Lipscomb*, No. A128549, 2012 WL 2519057, at *1 (Cal. Ct. App. June 29, 2012). The California Supreme Court denied review on September 12, 2012. Answer, Ex. 9. Lipscomb has since filed several state habeas petitions, all of which were denied. Answer, Exs. 10-14.

1 STATEMENT OF THE FACTS

2 The California Court of Appeal summarized the relevant facts of the underlying crime as
3 follows:

4 The Shooting

5 On June 4, 2007, at approximately 11:55 a.m., Kenneth Lee parked
6 his car on Townsend Street in San Francisco, got out, and walked to
7 a nearby crosswalk where he waited for the pedestrian crossing light
8 to turn green. As he stood there, a silver Dodge Charger driven by
9 defendant pulled up into the crosswalk. Defendant made eye contact
10 with Mr. Lee and kept looking over at him. Because Mr. Lee
11 thought perhaps he knew the driver or that he was lost and wanted
12 directions, he bent down to peer in through the open passenger side
13 window and asked, "Can I help you?" Defendant, whom Mr. Lee
14 did not recognize, looked at him with a smirk on his face and
15 reached out as if he were going to hand him something. Instead,
16 defendant shot him two to three times. Mr. Lee, who suffered
17 gunshot wounds to his left forearm and both groins, collapsed onto
18 the sidewalk. Defendant drove away.

19 San Francisco police officer Richard Lee was in a nearby store on
20 Townsend Street when he heard two gunshots. He immediately ran
21 outside and saw Mr. Lee on the ground. As he ran towards him,
22 Officer Lee saw some bystanders pointing down Third Street. He
23 looked in the direction they were pointing and saw the back of a
24 silver car that looked like a Dodge Charger. As he was running, he
25 radioed to police dispatch that there had been a shooting and that the
26 suspect was in a silver car that was heading down Townsend Street
27 past Third Street. He then turned his attention to Mr. Lee. Over the
28 radio, he heard other officers reporting that they had the silver car in
their view.

The Police Chase

19 Officer Anthony Holder and recruit Officer Christine Hayes had just
20 initiated a traffic stop on New Montgomery Street near Mission
21 Street when they heard a radio broadcast of shots fired near Third
22 and Townsend Streets, with the suspect in a gray or silver car
23 heading towards the freeway. Anticipating that the driver might
24 attempt to get on the Bay Bridge, they got in their patrol car and
25 drove to the area of Bryant and Second Streets. As they were
26 stopped at a red light, Officer Holder spotted a gray Dodge Charger
27 being driven by defendant heading towards them. The officer made
28 a U-turn and pulled up behind the car. When he did so, defendant
suddenly accelerated and sped off. Officers Holder and Hayes took
off in pursuit and were soon joined by San Francisco Police Officer
Gary Peachey and others.

After leading the police on a high-speed chase through the city
streets—reaching speeds of 80 miles per hour at one point, as well
as hitting a car that was stopped in traffic—defendant eventually
became unable to maneuver through traffic, so abandoned his car at

1 Mission Street and New Montgomery and fled on foot. Officers
2 Holder and Hayes followed him, with Officer Peachey right behind.
3 They chased him into an alley before briefly losing sight of him.
4 Officer Peachey noticed a construction worker pointing to the door
5 of an abandoned building, so he went inside. Searching the
6 building, he found defendant in a bathroom, breathing hard and with
7 his shirt stripped off. Defendant was taken into custody without
8 further incident.

9 Meanwhile, other officers who had been involved in the pursuit had
10 secured defendant's abandoned car, which bore the license plate
11 "5RLG375." Inside, they found a .40-caliber, semi-automatic
12 handgun lying on the front passenger seat. The hammer of the gun
13 was cocked, which typically indicates that the gun has recently been
14 fired. They also found three bullet casings, an unfired .40-caliber
15 bullet, and a wallet containing defendant's driver's license.
16 Defendant's fingerprint was found on the gun, as well as on other
17 objects in the car, and the driver's side headliner and a glove in the
18 car tested positive for gunshot residue. A bullet jacket found at the
19 scene of the shooting had been fired from the gun found in
20 defendant's car.

21 **Witnesses to the Shooting**

22 There were numerous witnesses to the incident. Lindell Wilson was
23 walking down Townsend Street when he heard a "pop." He looked
24 up in the direction of the noise, heard another "pop," and then saw
25 Mr. Lee drop to the ground about 125 yards away. A silver car—the
26 only car that Mr. Wilson remembered seeing in the vicinity—then
27 drove past him down Townsend. Mr. Wilson was on the driver's
28 side of the car, and through the open driver's side window, saw
defendant behind the wheel. The car stopped at the next intersection
because the light was red, which gave Mr. Wilson enough time to
note the license plate number—5RLG375—and write it down. He
then gave the number to the police who responded to the scene.

Kerry Atkinson was also walking on Townsend Street, getting ready
to have lunch with his wife and a coworker. As he was standing on
the street corner, a silver car stopped in the crosswalk across the
street from him. The windows were down on both sides of the car,
and through the open window he could see the silhouette of a
stocky, black man in the driver's seat. He saw Mr. Lee bend down
to the car window and have an exchange with the driver. He heard
two shots come from the car and saw Mr. Lee fall to the ground.
The car then drove off down Townsend Street. Mr. Atkinson ran
over to help Mr. Lee, and when Officer Lee arrived, he provided a
description of the car and the direction in which it was heading. Mr.
Atkinson was later taken to New Montgomery and Mission Streets
and shown defendant's car, which he identified as the car he saw
leave the scene of the shooting. He was unable to positively identify
defendant as the driver, but he said that defendant was "very
similar" to the shooter.

William Sherman was at an automobile window repair shop on
Townsend Street. He had just walked out of the shop and headed
left onto Townsend towards Third Street when he heard two

gunshots. Looking across the street from where the sound had come, he saw a grey or silver car stopped in or near a crosswalk and Mr. Lee lying on the street. The car then pulled away slowly, stopped at a red light at Third and Townsend, and turned toward Second Street. Because he suspected that the car had been involved in some kind of incident, Mr. Sherman tried to note the license plate but was only able to get the numbers and not the letters. He gave the partial plate—5____375—to Officer Lee. He was later taken to another location, where he identified defendant's car as the car he saw on Townsend Street.

A nearby security camera captured an image of a car resembling defendant's on Townsend Street at the time of the shooting.

Mr. Lee's Identification of Defendant

Mr. Lee suffered serious injuries and was taken to San Francisco General Hospital, where he would undergo surgery. Before he was taken into surgery, however, the police brought defendant to the hospital for possible identification. Mr. Lee, who had been given "a lot" of pain medication, could not say "100 percent" that defendant was the assailant, although he noted that they shared some similarities, such as the roundness of the face, build, age, and mustache.

At a preliminary hearing in 2008, however, Mr. Lee positively identified defendant as the shooter. And he reiterated his positive identification at trial, explaining he had no doubts because "I'll never forget those eyes." At trial, Mr. Lee explained why he had been unable to make a positive identification in the hospital but could do so at the preliminary hearing: "Well, I was of clear mind. And the circumstances which I—at the hospital, I couldn't in my heart, because I really wasn't 100 percent coherent, having just been shot, pumped full of medication, being pressured to go into surgery and having all the inspectors trying to get a statement from me and make an identification, I just didn't think it was fair to—I couldn't do it."

On cross-examination, Mr. Lee acknowledged that on the day of the preliminary hearing, while he was waiting outside the courtroom, one of the officers involved in the case put a file down on the bench next to him, and he saw defendant's picture on the file. Mr. Lee told the officer, "That's the guy who shot me." The officer responded, "You didn't see this."

Defendant's Confession

San Francisco police inspectors Mike Morley and Rich Danielly interviewed defendant shortly after his arrest. When asked if he would like to talk about what happened that day, defendant responded that he was "just tripping," that he "[j]ust was upset," "frustrated," and depressed because he was broke and could not get a better job. He then explained that he drove his wife's car from Vallejo, and as he was driving down a street in San Francisco, he saw an Asian man walking. He stopped his car and said, "Excuse me." When the man looked over, he fired two to three times through the open passenger window with a .40-caliber gun that he

had bought off the street. This was, according to defendant, the first time he had ever shot someone randomly. He claimed he was not trying to hurt anybody and that he felt bad afterwards. He also claimed that he did not realize that he shot the man. He had seen Mr. Lee at the hospital, and denied that he was the man at whom he had fired his gun. When asked what happened after he fired the gun, defendant admitted leading the police on a high-speed chase.

Lipscomb, 2012 WL 2519057, at *1-3 (footnote omitted).

STANDARD OF REVIEW

A district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to mixed questions of law and fact, *Williams v. Taylor*, 529 U.S. 362, 407-09 (2000), while the second prong applies to decisions based on factual determinations, *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

A state court decision is "contrary to" Supreme Court authority, that is, falls under the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13. A state court decision is an "unreasonable application of" Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly identifies the governing legal principle from the Supreme Court's decisions but "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The federal court on habeas review may not issue the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must be "objectively unreasonable" to support granting the writ. *Id.* at 409.

Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence

1 presented in the state-court proceeding.” *See Miller-El*, 537 U.S. at 340; *see also Torres v.*
2 *Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000). Moreover, in conducting its analysis, the federal
3 court must presume the correctness of the state court’s factual findings, and the petitioner bears the
4 burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

5 The state court decision to which § 2254(d) applies is the “last reasoned decision” of the
6 state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Barker v. Fleming*, 423 F.3d
7 1085, 1091-92 (9th Cir. 2005). When there is no reasoned opinion from the highest state court to
8 consider the petitioner’s claims, the court looks to the last reasoned opinion. *See Nunnemaker* at
9 801-06; *Shackelford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000).

DISCUSSION

10 As grounds for federal habeas relief, Lipscomb asserts that: (1) counsel was ineffective for
11 failing to challenge the victim’s identification and the trial court erred by admitting this suggestive
12 identification; and (2) the trial court erred by failing to hold a competency hearing and counsel
13 was ineffective for failing to request a competency hearing and not moving to suppress his
14 statement to police.

I. IDENTIFICATION EVIDENCE

15 Lipscomb argues that counsel was ineffective for failing to challenge the victim’s
16 identification and that the trial court improperly admitted the evidence.

Legal Standard

17 A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth
18 Amendment right to counsel, which guarantees not only assistance, but effective assistance of
19 counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The benchmark for judging any
20 claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning
21 of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id.*
22

23 In order to prevail on a Sixth Amendment ineffectiveness of counsel claim, petitioner must
24 establish two things. First, he must establish that counsel’s performance was deficient, i.e., that it
25 fell below an “objective standard of reasonableness” under prevailing professional norms.
26 *Strickland*, 466 U.S. at 687-88. Second, he must establish that he was prejudiced by counsel’s
27

1 deficient performance, i.e., that “there is a reasonable probability that, but for counsel’s
2 unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “A
3 reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

4 “A conviction which rests on a mistaken identification is a gross miscarriage of justice.”
5 *Stovall v. Denno*, 388 U.S. 293, 297 (1967). Thus, the Constitution “protects a defendant against a
6 conviction based on evidence of questionable reliability, not by prohibiting introduction of the
7 evidence, but by affording the defendant means to persuade the jury that the evidence should be
8 discounted as unworthy of credit.” *Perry v. New Hampshire*, 132 S. Ct. 716, 723 (2012) (citing
9 rights to counsel, compulsory process, confrontation, cross-examination, as examples).

10 Due process requires suppression of eyewitness identification evidence “when law
11 enforcement officers use an identification procedure that is both suggestive and unnecessary.” *Id.*
12 at 718; *see Manson v. Brathwaite*, 432 U.S. 98, 107-09 (1977); *Neil v. Biggers*, 409 U.S. 188, 196-
13 98 (1972). The purpose of this rule is “to deter police from rigging identification procedures.”
14 *Perry*, 132 S. Ct. at 721.

15 **Discussion**

16 The California Court of Appeal denied the claim that counsel was ineffective:

17
18 Defendant challenges the validity of his conviction on that ground
19 that Mr. Lee’s identification of him as the shooter was procured in
20 an unduly suggestive manner, specifically, that it was improperly
21 influenced by the police officer who let him see—unintentionally or
22 otherwise—defendant’s mugshot while he was waiting to testify at
23 defendant’s preliminary hearing. Defendant contends that his
24 counsel should have moved to strike Mr. Lee’s identification of him,
and that the failure to do so amounted to ineffective assistance of
counsel. Further, he claims that admission of Mr. Lee’s testimony at
trial violated his right to due process. We need not decide whether
Mr. Lee’s identification was improperly influenced, however,
because in order to prevail on his claims, defendant must also
demonstrate that he was prejudiced by the alleged error. This, he
cannot do.

25 . . .

26 Multiple eyewitnesses identified defendant’s car as the car involved
27 in the shooting. Lindell Wilson saw a silver car driving away from
the scene of the shooting. He wrote down the license plate number,
which matched that of the car defendant was driving during the
police chase. Mr. Wilson also identified defendant as the driver of

1 the car. Kerry Atkinson saw a silver car leaving the scene, and
2 when later shown defendant's car, identified it as the car he saw
3 leaving the shooting. William Sherman saw a silver or gray car
4 leaving the scene and noted the numbers of the license plate,
5 numbers that matched those on defendant's plate. He later identified
6 defendant's abandoned car as the car he saw leaving the shooting.
Officer Lee, who was in a nearby store when the shooting occurred,
saw witnesses pointing to a car that was leaving the scene, a car he
identified as a Dodge Charger, which was the make and model of
defendant's car. Finally, a closed-circuit television in the vicinity of
the shooting recorded a Dodge Charger at the scene at the time of
the shooting.

7 A car matching the description of that involved in the shooting was
8 spotted by numerous San Francisco police officers within moments
9 of the shooting, and defendant was driving that car. Officers Holder
10 and Hayes, who led the pursuit, saw defendant exit the Dodge
Charger and continue running on foot. Officer Peachey chased
defendant from the car to the abandoned building where he was
ultimately arrested.

11 Further, the forensic evidence tied defendant to the shooting. A gun
12 bearing defendant's fingerprint was found in his car, and gunshot
13 residue was detected on the car's headliner and a glove found in the
car. A bullet casing retrieved from the scene of the shooting had
been fired from the gun in defendant's car.

14 Finally, defendant admitted to Inspectors Morley and Danielly that
15 he fired his gun at an Asian man walking down the street in San
Francisco.

16 In light of this evidence, there can be no question but that the
17 outcome of the trial would have been the same even without Mr.
18 Lee's identification. As defendant cannot establish that but for his
counsel's failure to move to strike Mr. Lee's identification, there
19 was a reasonable probability that the outcome would have been
different, his ineffective assistance of counsel claim fails.

20 *Lipscomb*, 2012 WL 2519057, at *4-5.

21 The California Court of Appeal reasonably applied *Strickland* in ruling that Lipscomb was
22 not prejudiced by counsel's failure to object to the identification evidence. It is clear an objection
23 to the identification would not have produced a different result. Even without Mr. Lee's
identification, there was a wealth of other evidence that could have easily led to his conviction.
24 The state court noted the other eyewitnesses, the confession, and the physical evidence implicating
25 Lipscomb. To be entitled to habeas relief, Lipscomb must have made it clear that the likelihood of
26 a different result in his trial is not just "conceivable," but "substantial." *Harrington v. Richter*,
27 562 U.S. 86, 112 (2001). The likelihood of a different result without Mr. Lee's identification is
28

1 not even conceivable, let alone substantial. Accordingly, Lipscomb is not entitled to habeas relief
2 on this claim.

3 The California Court of Appeal also found that the trial court did not err in admitting the
4 identification evidence:

5 The absence of prejudice similarly defeats defendant's claim that he
6 was deprived of due process. (See *Chapman v. California* (1967)
7 386 U.S. 18, 24 [where defendant was deprived of a federal
8 constitutional right, no reversal where error was harmless beyond a
9 reasonable doubt].) In light of the overwhelming evidence of
defendant's guilt, as detailed above, there can be no doubt that any
claimed error in the admission of Mr. Lee's identification was
harmless.

10 Defendant impliedly concedes the correctness of this conclusion. In
11 his opening brief, he argues that Mr. Lee's identification of
12 defendant was the result of an unduly suggestive identification
13 process, and that without it, the prosecution would have had "a
14 difficult time establishing beyond a reasonable doubt that
15 [defendant] was the man who shot Lee." In response, the People
16 detail the extensive evidence, aside from Mr. Lee's identification,
17 establishing that defendant was the shooter, and argue that in light of
18 the evidence, defendant cannot show prejudice. In reply, defendant
19 completely fails to acknowledge this argument. Rather, he merely
reargues his position that Mr. Lee's identification was unduly
influenced and therefore unreliable. He ignores the eyewitness
testimony and forensic evidence tying him to the crime, baldly
concluding that "Lee's identification of [defendant] at trial was
necessarily prejudicial to appellant." By failing to respond to the
People's argument that he was not prejudiced by the admission of
Mr. Lee's identification because of the other evidence identifying
him as the shooter, defendant has as much as conceded the validity
of the argument.

20 *Lipscomb*, 2012 WL 2519057, at *5.

21 The Supreme Court has made it clear that a defendant is not necessarily entitled to exclude
22 unreliable testimony from the record entirely. So long as the defendant is afforded the "means to
23 persuade the jury that the evidence should be discounted as unworthy of credit," due process has
24 not been violated. *Perry*, 132 S. Ct. at 723. Lipscomb was afforded such means to challenge the
25 creditworthiness of Mr. Lee's identification. The circumstances of the identification were
26 presented to the jury, and on cross-examination and closing argument trial counsel directly called
27 into doubt the reliability of the identification. Reporter's Transcript ("RT") at 220-23; 1032-36.

1 Lipscomb was not denied his due process rights when Mr. Lee's identification was admitted
2 because he was given the opportunity to discredit the identification.

3 Even if pretrial identification procedures violated the Due Process Clause, that error must
4 still be analyzed for harmlessness under the standard set forth in *Brech v Abrahamson*, 507 U.S.
5 619, 623 (1993), to determine if the error had a "substantial and injurious effect or influence on
6 the jury's verdict." *See Williams v. Stewart*, 441 F.3d 1030, 1038-39 (9th Cir. 2006) (considering
7 allegedly unconstitutional pretrial identification procedure, and analyzing for harmlessness under
8 *Brech*); *see also Johnson v. Sublett*, 63 F.3d 926, 928-29 (9th Cir. 1995) (prejudice from
9 unreliable identification may be mitigated by cross-examination and other courtroom safeguards);
10 *Simmons v. United States*, 390 U.S. 377, 384 (1968) (danger that photo lineup technique may
11 result in conviction based on misidentification may be lessened by cross-examination at trial).

12 Even if it were an error to admit the evidence, Lipscomb cannot demonstrate that it had a
13 detrimental effect upon his defense. The California Court of Appeal reasonably applied
14 established constitutional law in denying this claim, and the admission of the identification
15 evidence did not have a substantial and injurious effect upon his defense. As discussed above, the
16 remaining incriminating evidence against Lipscomb was overwhelming. This claim is denied.

17 II. COMPETENCY

18 Lipscomb next argues that the trial court erred in failing to hold a competency hearing and
19 that counsel was ineffective for failing to raise the issue and not moving to have Lipscomb's
20 statement to the police suppressed.

21 Legal Standard

22 The test for competence to stand trial is whether the defendant demonstrates the ability "to
23 consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well
24 as factual understanding of the proceedings against him." *Godinez v. Moran*, 509 U.S. 389, 396
25 (1993) (quoting *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)); *Douglas v. Woodford*,
26 316 F.3d 1079, 1094 (9th Cir. 2003). The question "is not whether mental illness substantially
27 affects a *decision*, but whether a mental disease, disorder or defect substantially affects the

1 prisoner's *capacity* to appreciate his options and make a rational choice" *Dennis v. Budge*,
2 378 F.3d 880, 890 (9th Cir. 2004).

3 Due process requires a trial court to order a psychiatric evaluation or conduct a
4 competency hearing *sua sponte* if the court has a good faith doubt concerning the defendant's
5 competence. *Pate v. Robinson*, 383 U.S. 375, 385 (1966). This responsibility continues
6 throughout trial. *Drope v. Missouri*, 420 U.S. 162, 181 (1975).

7 A good faith doubt about a defendant's competence arises if "a reasonable judge, situated
8 as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed,
9 should have experienced doubt with respect to competency to stand trial." *Maxwell v. Roe*, 606
10 F.3d 561, 568 (9th Cir. 2010) (quoting *de Kaplany v. Enomoto*, 540 F.2d 975, 983 (9th Cir. 1976)
11 (en banc)); *see, e.g., Stanley v. Cullen*, 633 F.3d 852, 860-61 (9th Cir. 2011) (not unreasonable for
12 trial court to conclude there was not enough evidence before it to raise a doubt about defendant's
13 competence to have *sua sponte* held a hearing where defendant made some questionable choices in
14 strategy and acted oddly but defense counsel specifically informed trial court several times that
15 they had no doubt about defendant's competency to assist them and defendant was coherent in his
16 testimony and colloquies with the court); *Cacoperdo v Demosthenes*, 37 F.3d 504, 510 (9th Cir.
17 1994) (denial of motion for psychiatric evaluation did not render trial fundamentally unfair where
18 petitioner made single conclusory allegation he suffered from mental illness).

19 Several factors are relevant to determining whether a hearing is necessary, including
20 evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion
21 on competence to stand trial. *Drope*, 420 U.S. at 180. "In reviewing whether a state trial judge
22 should have conducted a competency hearing, we may consider only the evidence that was before
23 the trial judge." *McMurtrey v. Ryan*, 539 F.3d 1112, 1119 (9th Cir. 2008). The failure of
24 petitioner or his attorney to request a competency hearing is not a factor in determining whether
25 there is a good faith doubt in the defendant's competency. *Maxwell*, 606 F.3d 574 (trial judge has
26 an "independent duty" to hold competency hearing if there is a good faith doubt).

1 Discussion

2 The claim that the trial court erred by not holding a competency hearing was presented in a
3 state habeas petition to the San Francisco County Superior Court, which was the last court to issue
4 a reasoned decision. The Superior Court denied the claim stating:

5 Petitioner alleges in his writ of habeas corpus that he was denied due
6 process because the trial court failed to order a mental competency
7 hearing. Petitioner concedes that neither his counsel nor the court
8 ever raised the issue of his competency, but he argues this is not
determinative, especially considering his mental health history.

9 . . .

10 Petitioner fails to provide sufficient documentary evidence that he
11 was mentally incompetent at the time of trial. To support his claim,
12 petitioner includes with his writ of habeas corpus his mental health
13 records from San Quentin, High Desert State Prison, and the state
14 prison in Sacramento. The evidence describes, for instance, a past
15 suicide attempt, petitioner's being placed in a safety cell, certain
16 diagnoses such as adjustment disorder with conduct problems and
17 antisocial personality disorder, and behavior while incarcerated.
18 However, all of the evidence provided documents events and
diagnoses that occurred after he was convicted of his life crimes.
Petitioner provides no evidence that he was suffering from any
apparent mental health issues at the time of his trial, which
commenced in December 2008 and ended in 2009. Accordingly,
none of the records indicate that at the time of his trial he was
“unable to understand the nature of the criminal proceedings or to
assist counsel in the conduct of a defense in a rational manner.”
(Cal. Pen. Code § 1367(a).)

19 Ex. 11 at 1-2.

20 In this case, the state court found that Lipscomb failed to provide sufficient evidence that a
21 competency hearing was necessary or that he was mentally incompetent at trial. “In reviewing
22 whether a state trial judge should have conducted a competency hearing, we may consider only the
23 evidence that was before the trial judge.” *McMurtrey*, 539 F.3d at 1119.

24 Lipscomb presents no evidence to support his assertion that he was incompetent at the time
25 of the trial. The majority of evidence he presents occurred well after his trial and was therefore
26 unknown by the trial court. He identifies no interactions with counsel or the court that should
27 have called his competency into question. The trial began on December 9, 2008, and ended on
28 January 14, 2009. *Lipscomb*, 2012 WL 2519057 at *4; RT at 1083-94. Lipscomb argues that his

1 psychiatric disorder became clearly apparent on March 17, 2010, while in San Francisco County
2 Jail. Answer, Ex. 10 at 126 of 256. The remainder of his evidence consists of prison medical
3 records dated 2010 and later. The only reference to any mental problems prior to 2010 is a note in
4 a prison medical report that Lipscomb had been hospitalized in June 2007 in the jail psychiatric
5 services section. Answer, Ex. at 141 of 256. There is no additional information regarding this
6 incident nor is it alleged that the trial court was aware of it, and Lipscomb presents no arguments
7 how this incident 18 months prior to trial, supports his assertion of incompetency at trial.

8 Moreover, on December 8, 2008, a day before the trial commenced, Lipscomb testified at a
9 hearing on a motion to suppress his statement. Answer, Ex. 3 at 139, 159-78. The transcripts of
10 the hearing reflect competent testimony, in that he understood the questions being asked and he
11 provided thoughtful answers. *Id.*; *see, e.g., Benson v. Terhune*, 304 F.3d 874, 885-86 (9th Cir.
12 2002) (testifying in one's own defense is the "quintessential act of participating in one's own trial"
13 and a defendant's "lengthy, logical and cogent trial testimony reflects a sufficient ability to
14 understand the proceedings and to assist in her own defense")

15 Lipscomb presents no evidence that he was mentally impaired at the time of his trial. His
16 conclusory arguments with no support are insufficient to establish any indicia of incompetence.
17 This claim is denied because he has failed to demonstrate that the state court opinion was an
18 unreasonable determination of the facts or an unreasonable application of Supreme Court
19 authority.

20 The San Francisco Superior Court also denied the claim that trial counsel was ineffective
21 for failing to request a competency hearing and not moving to suppress the statement to police:

22 Here, petitioner provides no facts to support his claim that trial
23 counsel was inattentive to petitioner's mental instability and should
24 have requested a competency hearing. In fact, as discussed above,
25 petitioner does not provide any evidence that he was mentally
26 unstable at the time of his trial. Further, trial counsel's failure to
27 move to suppress petitioner's statements to the police was a tactical
28 decision. Given that the transcript of the police interview that
petitioner attached to his writ shows he clearly waived his *Miranda*
rights, trial counsel was reasonable in not moving to suppress the
statements. The reviewing court should not second guess counsel's
decision. After all, it is reasonable for counsel to not move to
suppress statements that do not violate a defendant's constitutional
rights. If petitioner is arguing these statements should have been

1 suppressed because of his mental incompetency, petitioner, again
2 has not provided sufficient documentary evidence to support his
3 claim.

4 Moreover, while petitioner claims that counsel's failure to suppress
5 the statements and failure to request a competency evaluation
6 prejudiced him in general, he has not given any concrete explanation
7 of how he was prejudiced nor has he demonstrated a reasonable
8 probability that the overall result of his trial would have been
9 different had these particular tactical decisions not been made.
10 Thus, petitioner fails to provide sufficient evidence that his trial
11 counsel was ineffective.

12 Ex. 11 at 5.

13 Counsel's failure to request a competency hearing violates the Sixth Amendment right to
14 effective assistance of counsel only when "there are sufficient indicia of incompetence to give
15 objectively reasonable counsel reason to doubt the defendant's competency, and there is a
16 reasonable probability that the defendant would have been found incompetent to stand trial had
17 the issue been raised and fully considered." *Stanley v. Cullen*, 633 F.3d 852, 862 (9th Cir. 2011)
18 (quoting *Jermyn v. Horn*, 266 F.3d 257, 283 (3d Cir. 2001)).

19 Lipscomb offers no evidence that he was mentally impaired at the time of his trial that
20 could establish sufficient indicia of incompetence. When evaluating counsel's performance for
21 effective assistance purposes, counsel's performance should be "viewed as of the time of counsel's
22 conduct," and not after the fact. *Strickland*, 466 U.S. at 690. Counsel could not possibly have
23 concluded that Lipscomb was incompetent to stand trial from incidents that took place at times far
24 outside of the trial, or from Lipscomb's statements and conduct during trial. "The reasonableness
25 of counsel's actions may be determined or substantially influenced by the defendant's own
26 statements or actions." *Strickland*, 466 U.S. at 691.

27 Lipscomb testified competently at the motion to suppress hearing and also competently
28 addressed the court to make a motion for a new trial and new counsel and to request a hearing
regarding the assistance of his second appointed counsel. RT at 1091-93, 1097-99. None of these
interactions indicated any reason to doubt Lipscomb's competency. As such, the state court's
decision was not unreasonable.

1 Nor was counsel ineffective for failing to move to suppress the statement to police
2 pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Counsel did seek to suppress the statement
3 on the grounds that it was obtained as a result of Lipscomb's unlawful arrest and detention and
4 that the statement was involuntary. CT at 52-63; RT at 55-131, 141-81. The record also indicates
5 that Lipscomb waived his *Miranda* rights at the beginning of his interview with police. CT at 272.
6 Counsel thus made a reasonable tactical decision not to raise a motion citing *Miranda* and instead
7 challenge the statement through other means. Lipscomb has failed to demonstrate that counsel
8 was ineffective for failing to move to suppress the statement or that he was prejudiced because the
9 motion, had it been made, would most certainly have been denied. Accordingly, he is not entitled
10 to relief on this claim.

CONCLUSION

12 1. The petition for writ of habeas corpus is **DENIED** on the merits. A certificate of
13 appealability will not issue. *See* 28 U.S.C. § 2253(c). This is not a case in which “reasonable
14 jurists would find the district court’s assessment of the constitutional claims debatable or wrong.”
15 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

16 2. Petitioner's motion to appoint counsel (Docket No. 24) is **DENIED**.

IT IS SO ORDERED.

18 | Dated: October 13, 2015

JAMES DONATO
United States District Judge

1
2
3
4
5 KEVIN LIPSCOMB,
6 Plaintiff,
7 v.
8
9 TIM VIRGA,
10 Defendant.

11 Case No. 13-cv-05744-JD

12 **CERTIFICATE OF SERVICE**

13 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.
14 District Court, Northern District of California.

15 That on October 13, 2015, I SERVED a true and correct copy(ies) of the attached, by
16 placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by
17 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery
18 receptacle located in the Clerk's office.

19 Kevin Lipscomb ID: AC5110 C-8-229
20 California State Prison-Sacramento
P.O. Box 290066
Represa, CA 95671

21
22 Dated: October 13, 2015

23
24 Susan Y. Soong
25 Clerk, United States District Court

26
27 By: Lisa R. Clark
28 LISA R. CLARK, Deputy Clerk to the
Honorable JAMES DONATO